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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:)	
)	Supreme Court No. R-09-_____
PETITION TO AMEND)	
RULES 46-74, RULES OF THE)	Petition to Amend Rules 46-74,
SUPREME COURT)	Rules of the Supreme Court,
)	and
)	Request for Modified Comment
)	Period
_____)	

Pursuant to Rule 28, Rules of the Supreme Court, David K. Byers, Chairman of the Attorney Discipline Task Force, respectfully petitions this Court to adopt amendments to Rules 46-74, Rules of the Supreme Court, governing attorney discipline and disability administration, as proposed in the attached Appendix A, showing the changes in legislative format. A clean copy of the proposed rules is attached as Appendix B.

I. Background and Purpose of the Proposed Rule Amendments

On July 1, 2009, the Court issued Administrative Order No. 2009-73, establishing the Attorney Discipline Task Force. The order directed the Task Force

to draft and file, by December 2009, a rule petition to amend the current attorney discipline system, consistent with the Court's strategic goals. The Task Force was specifically directed to include in its review the best practices currently being used in the Colorado attorney discipline system and to examine methods that would maintain due process and at the same time reduce the time and cost to process a case, particularly those cases that proceed to formal complaints.

The proposal set forth in Attachment A retains the basic structure of the current Arizona rules but adopts substantive provisions from the Colorado rules to achieve the Court's directive to improve the Arizona system. Some of the major changes include the following:

1. The proposal establishes the "Attorney Regulation Committee" (hereafter, "ARC"), a probable cause committee independent of the State Bar. Members of ARC will be appointed by the Court and will include attorneys and public members, similar to the composition of the current Disciplinary Commission. This not only makes the probable cause determination independent of the state bar, but it brings public input into the process at an earlier stage.

2. The proposal creates the position of a "presiding disciplinary judge" (hereafter, "PDJ"). This is a permanent, paid position. The PDJ is charged with maintaining and supervising a central office in which disciplinary and disability proceedings are conducted. The PDJ manages case proceedings, hears all

prehearing motions and discipline by consent cases, and participates as a member of the hearing panel in all formal proceedings.

3. Formal hearings in discipline and reinstatement matters will be conducted before a three-member hearing panel. These panels will be composed of a volunteer lawyer, a volunteer public member, and the presiding disciplinary judge.

4. The decisions of the PDJ and the hearing panel are final. The proposal eliminates the intermediate review and recommendation function of the Disciplinary Commission, replacing it with a direct appeal right to the Court.

5. The proposal attempts to encourage early resolution of cases, before they reach the formal complaint stage. Among other things, the rules permit bar counsel to refer matters to diversion prior to formal investigation and give bar counsel additional discretionary authority to dismiss the charges, with or without comment, in appropriate cases. In addition the PDJ is empowered to impose all sanctions, including disbarments, which decisions are final subject to appeal to the Court.

6. In addition to the steps mentioned above, the majority of the Task Force members believed that amendments to the rules relating to public access to disciplinary information were necessary. To provide the public with additional information, informal reprimands (changed to “admonitions” in the proposed rules to correspond to ABA nomenclature) with probation would be posted on the state bar website. Further, to avoid public misperception and to facilitate early

resolution, cases resulting in dismissals or referrals to diversion would not become public.

7. The proposal requires bar counsel to communicate with the complainant before discipline is recommended or imposed and to advise the complainant of the right to submit a written objection and to be heard.

II. Contents of the Proposed Rule Amendment

In addition to minor editorial and technical changes, the proposed amendments include the following:

Rule 46. Jurisdiction in Discipline and Disability Matters; Definitions

Rule 46(f). Definitions

In addition to making changes to various definitions to conform to proposed amendments in other rules, the proposed draft includes new definitions for “hearing panels,” “presiding disciplinary judge,” “settlement officers,” and “misconduct” (includes “unprofessional conduct as defined in Rule 31(a)(2)(E)”).

Rule 47. General Procedural Matters

Rule 47(b)(1). Amendment of Pleadings to Conform to Evidence

The proposal replaces the current provision with the language of Rule 15(b), Ariz. R. Civ. P.

Rule 47(g). Transcript of Hearings

The language of this rule is updated to take into account transcripts that may

be in electronic form. New language provides that a party requesting a transcript must arrange and pay for the transcription at the party's expense. If the record was not made by a certified reporter, the disciplinary clerk provides a copy of the verbatim recording to the party. The transcript must thereafter be filed with the disciplinary clerk and served on the opposing party.

Rule 47(h). Subpoena Power

The proposal authorizes chief bar counsel, as well as the chair or vice-chair of ARC, to issue investigative subpoenas for reasons including compelling a respondent to provide a written response to the allegations. This provision replaces current Rule 47(j), which requires that, when a lawyer fails to comply with a request for information, bar counsel must first give the lawyer ten days to comply and then may take the lawyer's deposition. Under the new rule, objections to investigative subpoenas are decided by the chair or vice-chair of ARC.

After a complaint is filed, Rule 47(h)(2) permits the parties to prepare, file, and serve subpoenas. Objections to hearing subpoenas are decided by the PDJ.

Under Rule 47(h)(4), the PDJ may issue an order to show cause for noncompliance with a subpoena. The new rule gives the PDJ civil contempt power. If a respondent is found to be in contempt, the PDJ may impose reasonable sanctions, including summarily suspending the respondent. In the latter case, upon respondent's compliance, the PDJ would issue an order reinstating the respondent.

Rule 47(i). Subpoenas; Form

The subpoena forms are amended to reflect the different structure of the discipline system and to permit subpoenas to compel lawyers to respond to bar counsel's request for information. The forms are also amended to include provisions entitled "Your Duties in Responding to This Subpoena" and "Your Right to Object," as required by Rule 45, Ariz. R. Civ. P.

Rule 48. Rules of Construction

The proposed amendments to Rule 48 substitute terminology to fit the new system.

Rule 49. Bar Counsel

The rules pertaining to the various participants in the process, Rules 49-53, have been moved and modified to account for the new positions and terminology.

Rule 49(a). Powers and Duties of Chief Bar Counsel

The Task Force recommends that the PDJ appoint and oversee volunteer lawyers who serve as conflict counsel. The current provision giving supervision of volunteer bar counsel to chief bar counsel has been deleted.

Rule 49(a)(2) requires bar counsel to post on-line notice of certain discipline orders, including disbarment, suspension, interim suspension, censure, and reinstatement; probation, restitution and costs; a finding of contempt of a supreme court order; a transfer to disability inactive status; and an administrative or

summary suspension.

Rule 49(b). Powers and Duties of Bar Counsel

Proposed Rule 49(b)(1) requires counsel to “review” instead of “investigate” information coming to the attention of the state bar. The rule also gives bar counsel “discretion in initiating investigations.” The Task Force anticipates these provisions, which reflect the Colorado approach, will permit early resolution in appropriate cases in which bar counsel believes an alternative, such as dismissal with comment or diversion, will suffice to protect the public and to insure compliance by the lawyer.

Rule 49(b)(3) specifically authorizes bar counsel to negotiate dispositions of pending matters “as authorized in Rule 57(a) [discipline by consent] and Rule 58 [formal proceedings].”

Rule 50. Attorney Regulation Committee

The language in Rule 50 replaces former provisions dealing with the Disciplinary Commission. Rule 50 establishes ARC as a nine-member, permanent committee of the Court, which will, among other things, serve the function of the current probable cause panelist. The make-up of ARC is identical to that of the Disciplinary Commission (six lawyers and three public members serving staggered terms). Instead of identifying specific geographic requirements, as the current rule does, the new rule requires the chief justice to consider “geographical, gender and

ethnic diversity” in making appointments. To accommodate potential fluctuations in ARC’s case load, the Task Force recommends that ARC be permitted to act through panels, which will include a public member. Current provisions permitting a change of a committee member for cause and permitting appointment of alternate members when a quorum may not be present are retained. The meetings of ARC are not open to respondent, respondent’s counsel, or the public; however, the respondent is permitted to provide a written statement.

ARC’s duties include reviewing dismissals by bar counsel when a complainant objects; reviewing bar counsel’s post-investigation recommendations of dispositions other than dismissal; reviewing written comments, if any, by the respondent or complainant; periodically reporting to the Court on the operation of the committee; and recommending to the Court amendments to the attorney discipline rules. Other non-administrative functions are set forth in Rule 55(c).

Rule 51. Presiding Disciplinary Judge

This rule is entirely new. The Court may appoint the PDJ and “other judges as necessary,” who must have been an active or judicial member of the bar for at least five years preceding the appointment. The PDJ will have broad powers to administer the discipline and disability system. The PDJ is authorized, among other things, to order the parties to attend a settlement conference; participate in formal proceedings as a member of the hearing panel; impose discipline (including

disbarment) or transfer an attorney to disability inactive status; shorten or expand time limits set forth in the rules; and enlist the assistance of members of the bar to conduct investigations in conflict cases. The PDJ may be challenged for cause only upon the grounds set forth in A.R.S. § 12-409(B). In the case of a challenge, the disciplinary clerk designates a volunteer attorney from a hearing panel pool to determine whether cause exists.

Rule 52. Hearing Panels

The proposal provides that the PDJ will serve as chair of the three-member hearing panels. Other members will include a volunteer attorney member and a volunteer public member, appointed from a hearing panel pool. Members of the hearing panel pool are appointed by the chief justice for fixed, staggered terms, similar to the current process for volunteer hearing officers. If a hearing panel member (other than the PDJ) is challenged for cause, the PDJ determines whether cause exists. Hearing panels have statewide jurisdiction over proceedings on complaints of misconduct and applications for reinstatement. Hearing panels are authorized to make findings of fact and conclusions of law and to issue orders imposing discipline and recommendations for reinstatement.

Rule 53. Complainants

Rule 53(b). Information

This provision relates to information the state bar must give to a complainant,

including notification of dismissal and prior notification of any discipline, diversion, or pending agreement for discipline by consent. It must also provide written notice of a hearing before the PDJ or a hearing panel. The rule gives complainants the right to object to a dismissal and to an agreement for discipline by consent, which objections will be reviewed by ARC. In the case of discipline by consent, the complainant will also have an opportunity to be heard at any hearing.

Rule 54. Grounds for Discipline

Language taken from the Colorado rules prefaces the list of grounds: “Misconduct by an attorney, both members and non-members, individually or in concert with others, . . . constitute[s] grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship.” The actual grounds, however, remain the same as in the current rules, except that current subsections (d) (evading service or refusal to cooperate) and (f) (failure to furnish information) are combined under the heading “violation of any obligation pursuant to these rules” The Task Force also recommends procedural provisions relating to convictions of crimes and reciprocal discipline be moved to the “Proceedings” section of the rules.

Rule 55. Initiation of Proceedings; Investigation

Rule 55(a). Commencement; Determination to Proceed

This provision requires the state bar to evaluate information coming to its

attention “in any form” for “unprofessional conduct” (previously “lack of professionalism”). If the lawyer is subject to this Court’s disciplinary jurisdiction, the state bar may dismiss a matter “with or without comment;” enter into a diversion agreement under appropriate circumstances; or refer the matter for a screening investigation.

Rule 55(b). Investigation and Recommendation by the State Bar

Under this provision, the respondent has 20 days after the state bar’s notice of allegations to respond in writing. Bar counsel is authorized to grant one extension. If the respondent fails to respond, bar counsel may request an investigative subpoena to compel respondent’s attendance and production of documents. Refusal to comply subjects respondent to contempt proceedings.

After conducting a screening investigation, bar counsel may dismiss a charge with or without comment if there is no probable cause. In that event, bar counsel must provide a written explanation of the dismissal to the complainant. If the complainant objects, the matter is reviewed by ARC, which must sustain a dismissal unless it “constituted an abuse of discretion.”

If investigation results in a recommendation for diversion, stay, probation, restitution, admonition, or assessment of costs, bar counsel must provide to the complainant and the respondent a written explanation of the recommendation. Bar counsel must inform the complainant of the right to submit a written objection, and

the respondent of the right to submit a summary of the response to the charges, not to exceed five (5) pages. The complainant's objection and respondent's summary of the response are submitted to ARC along with bar counsel's report and recommendation for discipline and respondent's response.

Rule 55(c). Decision by Committee

Under this rule, ARC reviews any state bar recommendation other than dismissal or referral to diversion after an investigation. Bar counsel submits a report of investigation and recommendation, together with a copy of respondent's summary of the response to the charges, and any written objection from the complainant. ARC may direct bar counsel to conduct further investigation; dismiss the allegations and furnish the complainant with a written explanation of its determination; refer the matter to diversion; order an admonition, probation, restitution, assessment of costs and expenses, or a stay; or authorize bar counsel to prepare and file a complaint against the respondent or a petition for transfer to disability inactive status. The rule sets forth factors ARC must consider in authorizing a complaint. ARC's decision is filed with the state bar.

ARC's decision is final with respect to dismissal, diversion, stay, admonition, assessment of costs and expenses, probation, restitution, and the filing of formal discipline or disability proceedings. Respondent, however, may demand that a formal proceeding be instituted before the PDJ.

Rule 56. Diversion

Rule 56(b). Referral to Diversion

Under Rule 56(b), the Court must approve the Diversion Guidelines adopted by the Board of Governors. To provide the bar and the public with more information about the diversion program, these Guidelines will be posted on the state bar website.

Rule 56(c). Approval of Diversion Agreement

The rules allow early resolution of non-serious conduct through diversion. For example, no authorization by ARC is necessary for the parties to enter into a diversion agreement prior to bar counsel's formal investigation. Diversion continues to be an available option throughout the discipline proceedings. After a formal investigation, however, the rules require authorization from ARC, the PDJ, or the Court, as appropriate.

Rule 56(d). Reinstatement of Discipline Proceeding

Rule 56(d) provides that a discipline matter is suspended during diversion, but may be reinstated if a respondent violates the terms of the agreement.

Rule 56(e). Dismissal

If a lawyer successfully completes diversion, Rule 56(e) provides that the matter will be dismissed by the appropriate entity. New language states that a dismissal order under this rule may not be considered as a prior disciplinary offense

in aggravation.

Rule 57. Special Discipline Proceedings

This rule combines former Rules 56 (discipline by consent) and 53(i) (procedure for reciprocal discipline).

Rule 57(a). Discipline by Consent

These provisions have been reorganized. Rule 57(a)(2)(E) combines the former tender of admissions and joint memorandum in support of agreement for discipline by consent into a single document entitled agreement for discipline by consent. New language permits exhibits to be filed with the agreement, as agreed upon by the parties.

Rule 57(a)(3) replaces former Rule 56(b) pertaining to procedure for discipline by consent. Under a new provision, 57(a)(3)(A), if the agreement is reached before the authorization to file a formal complaint and involves only lower level sanctions, the parties may request an order from ARC pursuant to Rule 55(c) by providing the investigative report and bar counsel's recommendation for sanction. Alternatively, a more formal agreement and supporting exhibits may be submitted to ARC for its review.

Under Rule 57(a)(3)(B), if the agreement is reached before the authorization to file a formal complaint and the agreed sanction includes a censure or suspension, or if the agreement is reached after the authorization to file a formal complaint, the

agreement is presented to the PDJ for review. The PDJ may accept, reject, or recommend modification of the agreement (the same choices the hearing officer currently has).

Rule 57(a)(5), which relates to disbarment by consent, permits the PDJ to accept a consent to disbarment and to enter a judgment disbaring the member.

Rule 57(b). Reciprocal Discipline

The procedural rules for imposition of reciprocal discipline were previously found in Rule 53(i), grounds for discipline, but have been moved to Rule 57(b). The procedure for reciprocal discipline remains the same, except that the disciplinary order is filed with the PDJ instead of the Disciplinary Commission.

Rule 58. Formal Proceedings

The initial stages of formal proceedings, including the complaint, the answer, and the initial case management conference, remain essentially the same. Editorial changes and appropriate changes in terminology have been made.

Rule 58(d). Default Procedure; Aggravation/Mitigation Hearing

The time within which the disciplinary clerk must serve a notice of default is changed from ten days after the respondent's failure to answer to five days.

Aggravation/mitigation hearings are held before a hearing panel. New time limits are set forth for the aggravation/mitigation hearing, which require that the hearing must be held between 15 and 30 days after entry of default. The PDJ is required to

give at least 15 days notice of the hearing.

Rule 58(e). Initial Disclosure Statements

Recent changes to this rule require the state bar to serve its initial disclosure statement when the complaint is served. The Task Force recommends amending the rule to require service of the disclosure within ten days *after* the answer is filed. The respondent's disclosure statement continues to be due 30 days after the answer is filed.

Rule 58(g). Settlement Conference

The major change to this section is that the settlement officer officiates at the conference but does not conduct any hearing regarding an agreement for discipline by consent. Such hearings are held by the PDJ.

Rule 58(h). Prehearing Conference

Under the proposed rules any prehearing conference is held before the PDJ instead of a hearing officer.

Rule 58(j). Hearing

Under the proposal, hearings will be held before a hearing panel. The 150-day limit for hearings remains in the proposal, but the complex case provisions have been eliminated. The provision permitting the Disciplinary Commission to authorize additional time to hold and complete the hearing has also been eliminated, as has the requirement that the Court be notified and decide whether the hearing

cannot reasonably be held and completed within the stated time limits. Instead, the PDJ, as he or she determines necessary in the exercise of discretion, may extend the time within which a hearing is to be held. *See* Rule 51(c)(4).

Rule 58(k). Report

The proposal recommends that the hearing panel's report be filed within 30 days after "completion of the formal hearing proceedings or receipt of the transcript, whichever is later." This change anticipates that in some cases, it will not be necessary to transcribe the record. The hearing panel's report will contain an order regarding discipline, rather than a recommendation, with sanctions determined in accordance with the *ABA Standards for Imposing Lawyer Sanctions* and, "if appropriate, a proportionality analysis."

Two members of the panel must agree on a decision; a dissenting panel member must indicate the basis of the dissent in the report. A copy of the report is served on the Clerk of the Court, in addition to the parties. If the report will be filed outside the time limits, the hearing panel must notify the Court and state the reason for the delay. A request for an extension is no longer necessary. The decision of the hearing panel is final, subject to the parties' appeal rights as set forth in Rule 59. The requirement of service on the clerk was added to give the Court the option to review a matter on its own motion if no appeal is filed.

Rule 59. Proceedings before the Court

New provisions for appeal to the Court replace the petition for review procedure. The provisions are loosely modeled on ARCAP.

Rule 59(a). Notice of Appeal

A party must file a notice of appeal with the disciplinary clerk within ten days after service of the PDJ's or hearing panel's report. Consent agreements are excepted from the appeal provisions, but lower level sanctions, previously appealed to the Disciplinary Commission, may be appealed to the Court.

Rule 59(b). Extension of Appeal Time

The PDJ, upon a showing of excusable neglect, may extend the time for filing a notice of appeal.

Rule 59(c). Stay Pending Appeal

The proposal provides that a stay should ordinarily be granted, "except when an immediate suspension has been ordered or when no conditions of probation and supervision while the appeal is pending will protect the public."

Rule 59(d). Transmittal of Record

The disciplinary clerk must transmit the record to the Clerk of the Court upon the filing, or the expiration of time for filing, a notice of cross-appeal. A party requesting additional transcripts must notify the Clerk of the Court, designating the transcripts requested, and must file the certified transcript within 30 days of the notice. Upon receipt of the record and the filing of any additional transcripts, the

Clerk of the Court will send a notice of docketing and filing of the record.

Rule 59(e). Time for Filing Briefs

Appellant's opening brief is due 30 days after the notice of docketing and filing of the record on appeal. Answering briefs are due 30 days after service of the opening brief. A reply may be filed 15 days after service of the answering brief.

Rule 59(f). Briefs; Form, Length, and Content

Briefs must conform to ARCAP 6(c). Principal briefs are limited to 10,500 words or 30 pages; reply briefs are limited to 7,000 words or 20 pages.

Rule 59(h). Discretionary Review by the Court

This provision is a safety valve, authorizing the Court, in its discretion, to review any decision of a hearing panel or the presiding disciplinary judge. The Task Force believed that, in the interest of justice, the Court should be able to review a matter, even if no appeal is filed.

Rule 59(j). Form of Decision

The Court may resolve any matter by opinion, memorandum decision, or order.

Rule 60. Disciplinary Sanctions

Rule 60(a). Types and Forms of Sanctions

The proposed amendments reflect that all sanctions may be imposed by the Court, a hearing panel, or the presiding disciplinary judge. References to sua

sponte review are eliminated. The forms of judgment for disbarment, suspension, and censure are also eliminated. The sanction of informal reprimand is changed to “admonition” to conform to the *ABA Standards*.

Rule 60(b). Assessment of the Costs and Expenses

ARC, the PDJ, a hearing panel, or the Court may impose an assessment of costs and expenses. New language provides that, upon a showing of good cause, all or a portion of the costs and expenses may be waived. Either party may contest the assessment of costs and expenses in a final order of the PDJ or a hearing panel by filing an appeal, as set forth in Rule 59.

Rule 61. Interim Suspension by the Court

The procedure for interrimly suspending a lawyer convicted of a misdemeanor involving a serious crime or a felony is moved from rule 53(h) to the interim suspension rule. Otherwise, the interim suspension provisions are essentially the same, except that a motion for interim suspension, other than one based on the lawyer’s conviction of a crime, is filed with the PDJ.

Rule 62. Summary Suspension by the Board of Governors

This rule remains the same, except that a lawyer summarily suspended may file an appeal instead of a petition for review.

Rule 63. Transfer to Disability Inactive Status

The PDJ hears disability proceedings and may issue an order transferring a

lawyer to disability inactive status. The PDJ's order is subject to the parties' right to appeal.

Rule 64. Reinstatement; Eligibility

Applications for reinstatement will be on forms approved and provided by the Court. Applications for reinstatement after suspensions of less than six months will now be filed with the disciplinary clerk and approved by the PDJ. A new provision in Rule 64(f)(1)(B) relates to members on summary suspension for more than two years. Under this provision, a suspended lawyer who meets certain requirements regarding active practice in another jurisdiction during the period of the summary suspension does not need to go through formal reinstatement proceedings, but may apply for reinstatement with the Board of Governors.

Rule 65. Reinstatement

Rule 65(a). Application for Reinstatement

This rule is amended to permit an on-line application process on a form approved by the Court. Language is also added to clarify that the rule applies to reinstatement after transfer to disability inactive status. New language states that the application fee, payment of which is a prerequisite to filing a reinstatement application, represents "an estimate of the costs of investigation by the state bar and the costs and expenses of all related proceedings before the presiding disciplinary judge, the hearing panel and the court."

Rule 65(b). Reinstatement Proceedings

A hearing on a reinstatement application is held before a hearing panel within 150 days of the filing of the application (increased from 120 days). The hearing panel must file a report with the Court, just as the Disciplinary Commission currently does. The Court ultimately determines whether the lawyer shall be reinstated.

Rule 66. Appointment of Conservator to Protect Client Interests

Rule 67. Duties of Conservator

Rule 68. Conservator; Bank and Other Accounts

Rule 69. Liability of Conservator.

The proposal does not change the conservatorship rules, with the exception of several minor editorial or grammatical changes.

Rule 70. Public Access to Information

Rule 70(a) and (b). Availability of and Exceptions to Availability of Information to the Public

Disciplinary records are generally open to the public upon the filing of an order by ARC pursuant to Rules 55(c)(1)(D) and 55(c)(1)(E). A majority of the Task Force, however, recommends that two categories that are currently open will be private under the proposed rules: records of dismissals by bar counsel or by ARC, and diversions. The Task Force recommends, however, that the record of diversion be available at a subsequent probable cause proceeding or hearing. Admonitions (formerly informal reprimands) with probation, which are currently

not published on the state bar's website, will be published.

Rule 70(g). Sealing the Record/Protective Orders.

Under the proposal, the PDJ may issue an order, on request by a party and for good cause shown, sealing a portion of the record. New language provides that a party aggrieved by an order relating to a request for a protective order may seek review by filing a petition for special action with the Court.

Rule 71. Expungement of State Bar Records

Rule 72. Notice to Clients, Adverse Parties and Other Counsel

Rule 73. [Reserved]

Rule 74. Certificates of Good Standing

The proposal does not substantively change Rules 71-74. Proposed amendments change only the terminology and make minor technical or editorial corrections.

III. Request for Modified Comment Period

Due to the complexity of the issues the Task Force faced and the relatively brief period of time in which the Task Force had to resolve the issues, the Task Force respectfully requests the Court modify the usual comment schedule as follows:

April 1 Initial comments to the petition due.

May 7 The committee's amended petition, if necessary, due.

June 7 Second round of comments to any amended petition due.

